

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE KARANTSALIS and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, San Francisco, Calif.

*Docket No. 96-1526; Submitted on the Record;
Issued July 9, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant met his burden of proof to establish that he sustained an injury on January 25, 1995 in the performance of duty.

The Board has duly reviewed the case record and concludes that appellant's injury on January 25, 1995 did not occur in the performance of duty.

The facts in this case indicate that on January 31, 1995 appellant, then a 33-year-old inspector, filed a claim alleging that he sustained chest, hand, arm and shoulder pain, headaches and lapses in memory following an attack by a coworker, Marc Beeson, in the employing establishment men's room at 2:00 p.m. on January 25, 1995. Following development of the record, by decision dated July 21, 1995, the Office of Workers' Compensation Programs denied the claim on the grounds that appellant's behavior in the January 25, 1995 incident constituted willful misconduct and, therefore, compensation was barred under 5 U.S.C. § 8102(a)(1). Following appellant's request, a hearing was held on January 24, 1996. In an April 8, 1996 decision, an Office hearing representative affirmed the prior decision. The instant appeal follows.

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹ The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."² "Arising in the course of employment" relates to the elements of time, place and work activity. To arise in the course of employment,

¹ 5 U.S.C. § 8102(a).

² This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.³

Section 8102(a)(1) of the Act states:

“The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is –

(1) caused by willful misconduct of the employee....”

The Board has defined willful misconduct as “deliberate conduct involving premeditation, obstinacy, or intentional wrongdoing with the knowledge that it is likely to result in serious injury or conduct which is in wanton or reckless disregard of probable injurious consequences.”⁴ The allegation of willful misconduct is an affirmative defense which must be invoked in the original adjudication of the claim⁵ and, if such defense is invoked, the Office has the burden to prove.⁶ Here, the Office properly invoked the affirmative defense of willful misconduct in the original adjudication of appellant's claim on July 21, 1995.

The Board finds that the weight of the evidence establishes that appellant was the aggressor and assaulted Mr. Beeson on January 25, 1995. The record in this case indicates that appellant and Mr. Beeson had a history of conflicts with each other.⁷ Regarding the January 25, 1995 incident, several days earlier Mr. Beeson had reported that some of his office equipment was missing, and at about 1:45 p.m. on January 25, 1995, in the presence of Mr. Beeson and employing establishment supervisors Patricio Macarenas and Karen Philis, appellant aired his belief that Mr. Beeson had accused him of taking the missing articles. Shortly after the incident in the men's room took place, Mr. Beeson provided a statement in which he disputed appellant's version of the men's room incident, stating that appellant entered the restroom behind him and first struck him in the back of the head and then approximately four times on the sides of his face. Mr. Beeson indicated that he then left the restroom and reported the incident. Furthermore, the record contains statements from six employing establishment coworkers and supervisors who were in agreement that appellant started an argument with Mr. Beeson regarding the missing equipment and each saw Mr. Beeson immediately after the men's room incident on January 25, 1995 when he was very upset and had red marks on his face and neck.

³ See *Dwight D. Henderson*, 46 ECAB 441 (1995); *Eugene G. Chin*, 39 ECAB 598 (1988).

⁴ *Judith D. Jenkins*, 32 ECAB 1219, 1220 (1981).

⁵ See *Gayle M. Petty*, 46 ECAB 996 (1995).

⁶ See *Bruce Wright*, 43 ECAB 284 (1991).

⁷ Appellant testified that his difficulties with Mr. Beeson began in 1993 when they were dating the same woman. He stated that the two had a history of bickering and calling each other insulting nicknames.

While appellant testified that Mr. Beeson had been the aggressor, he did not immediately report the restroom incident as Mr. Beeson did, and appellant admitted that he had received a five-day suspension as a result of the incident whereas Mr. Beeson received no punishment. The Board finds that the statements of Mr. Beeson and the coworkers and supervisors are more reliable than appellant's description of how the January 25, 1995 incident occurred. Hence, appellant's willful misconduct of starting a fight that was likely to have injurious consequences removed him from the performance of duty, and the January 25, 1995 injury is not compensable under the Act.⁸

The decisions of the Office of Workers' Compensation Programs dated April 8, 1996 and July 21, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 9, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ See *Soo F. Dong*, 47 ECAB ____ (Docket No. 95-1117, issued September 19, 1996).